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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 24 2005

Federal Communications Commission
Office of Secretary

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In the Matter of:

Request for Expedited Declaratory
Ruling Concerning the Territorial
Exclusivity Rule, Section 73.658(b)
of the Commission's Rules

MB Docket No. 04-75

**SUPPLEMENT TO JOINT MOTION FOR
EXPEDITED ISSUANCE OF SHOW CAUSE ORDERS**

On June 17, 2005, Max Media of Montana LLC ("Max Media") and Destiny Licenses, LLC ("Destiny") filed a Joint Motion for Expedited Issuance of Orders to Show Cause ("Joint Motion"). Almost immediately thereafter, NBC Universal, Inc. ("NBC") submitted, for the first time in this proceeding, new information about the history of its affiliation with KTGF(TV), Great Falls, Montana ("KTGF"), which in no way justifies the illegal arrangement between Sunbelt Communications Company ("Sunbelt") and NBC. *See Ex Parte* Submission of NBC dated June 21, 2005 ("NBC Submission"). This Supplement to the Joint Motion ("Supplement") briefly responds to the NBC Submission with three reasons why it is an unpersuasive, flawed and fabricated defense of Sunbelt's violation of the network territorial exclusivity rule.

First, the NBC Submission includes two pieces of correspondence from NBC to executives of Continental Television Network, Inc. ("Continental"), the former licensee of KTGF, dated March 30, 1993, and April 27, 1995. *See Exhibits A and B* (respectively) to NBC Submission. Copies of these letters had never been shared with the Commission, Max Media or

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Destiny, probably because they have no relevance. Simply put, NBC apparently has offered these letters in an eleventh-hour, desperate attempt to support an otherwise unsupported and unsupportable argument of “independent business discretion.”

A critical and material fact was omitted from the NBC Submission. NBC *renewed* Continental’s NBC affiliation *after* these letters were sent to Continental. NBC did not terminate the network affiliation of KTGF because of the issues addressed in these letters. In fact, KTGF’s current NBC affiliation commenced on April 5, 1996, a full 11 months after the more recent of the two letters. Therefore, these letters are *totally irrelevant* to NBC’s decision-making in 1999 – four years later – regarding KTGF’s NBC affiliation.

Second, nothing in the NBC Submission regarding KTGF’s status as an “outlier” was ever communicated to Max Media as a rationale for termination of the affiliation agreement. See Declaration of A. Eugene Loving (attached as Exhibit A). NBC has produced no correspondence to Continental, Max Media, or Destiny in support of that assertion. In fact, there was never *any* explanation offered to Max Media for NBC’s decision to terminate KTGF’s affiliation *before this proceeding began*, other than the fact that there was a deal between Sunbelt and NBC.

Even if the notion that NBC decided to terminate KTGF as an affiliate because NBC prefers to deal with only one affiliated company in a given Designated Market Area (“DMA”) is true, it is completely at odds with NBC’s business practices in the Great Falls DMA and in many other DMAs. Initially, NBC had only one affiliated company in the Great Falls DMA – Continental.¹ During Continental’s ownership of KTGF, NBC decided to affiliate with

¹ NBC had a longer relationship with an affiliate in Helena – but Helena is not part of the Great Falls DMA.

Sunbelt within the Great Falls DMA (Havre and Lewistown), thereby creating a presumably-undesirable dual-company presence in the Great Falls DMA. In addition, there are many examples of other DMAs in which NBC has affiliated with stations owned by more than one company.²

NBC's stated preference for dealing with a single owner in a single DMA warrants close scrutiny. Superficially, NBC's preference for consolidation of affiliate-owners within DMAs may not seem to be problematic from an FCC regulatory perspective. However, in this case, NBC's consolidation in the Great Falls DMA with Sunbelt resulted in a prohibited arrangement between NBC and Sunbelt, including the decision to terminate NBC's affiliation in Great Falls, a community in which Sunbelt was not licensed. This consolidation arrangement with Sunbelt clearly violated the network territorial exclusivity rule at the time of the 1999 NBC Letter, even if the signal of KTVH, Helena, could be extended to cover Great Falls (as the condition in the 1999 NBC Letter seemingly required).

Essentially, the NBC submission asserts NBC's business reasons for entering into the *prohibited* arrangement with Sunbelt. NBC's stated preference to eliminate a dual-company affiliation within the Great Falls DMA ultimately leads to a hypothetical question -- whether NBC would have terminated the network affiliation with KTGF without NBC having an arrangement with Sunbelt? However, the Commission need not reach that hypothetical, *because*

² See, e.g., DMA-81 (Huntsville-Decatur, AL); DMA-17 (Phoenix, AZ); DMA-118 (Ft. Smith-Fayetteville-Springdale-Rogers, AR); DMA-55 (Fresno-Visalia, CA); DMA-18 (Denver, CO); DMA-191 (Grand Junction-Montrose, CO); DMA-7 (Washington, DC-Hagerstown, MD); DMA-167 (Billings, MT); DMA-119 (Reno, NV); DMA-48 (Albuquerque-Santa Fe, NM); DMA-43 (Oklahoma City, OK); DMA-4 (Philadelphia PA); and DMA-36 (Salt Lake City, UT). Source: *Broadcasting & Cable Yearbook 2005*, at B-22 through B-115.

*there was a prohibited arrangement with Sunbelt and it is evident in the 1999 NBC Letter.*³

There is no business rationale for NBC's arrangement with Sunbelt that can excuse *Sunbelt's* misconduct in entering into the arrangement, which resulted in termination of KTGF's affiliation in the community of Great Falls in violation of Section 73.658(b) of the Commission's rules.

Third, even if NBC had a credible business judgment rationale for its decision to terminate KTGF as an affiliate under Continental's ownership, NBC has not explained why it did not terminate KTGF as an affiliate at that time (prior to Max Media's acquisition). Instead, after the correspondence provided in the NBC Submission, NBC renewed KTGF's affiliation agreement for a 10-year term. Moreover, NBC has not explained, if there was not a prior commitment to Sunbelt for the termination of KTGF's affiliation, and NBC was dissatisfied with Continental as an affiliate, why NBC did not impose conditions on the new owner, Max Media, to improve affiliate performance upon the assignment of the network affiliation agreement.

The facts before the Commission establish a violation of Section 73.658(b) by Sunbelt in cooperation with NBC. For the reasons set forth above, in the Joint Motion, and in the pleadings and *ex parte* submissions of Max Media and Destiny in this proceeding, the Commission should clarify the meaning of Section 73.658(b) by rejecting both Sunbelt's flawed attempt to cure the rule violation using an LPTV station and NBC's fabricated story of "independent business discretion." Finally, the Commission should adopt the following:

1. An Order to Show Cause Why the Licenses of Television Broadcast Stations KBAO, Lewistown, Montana; KBBJ, Havre, Montana; KJWY,

³ See letter from John Damiano, the Senior Vice President of NBC Television Network Affiliate Relations, to James C. Rogers, the Chairman of Sunbelt, dated April 28, 1999 ("1999 NBC Letter").

Jackson Hole, Wyoming; KSWY, Sheridan, Wyoming; KCWY, Casper, Wyoming; and KTVH, Helena, Montana Should Not Be Revoked for Violation of Section 73. 658(b) of the Commission's Rules;

2. An Order to Show Cause Why Sunbelt, Its Subsidiaries and Affiliates, Should Not Be Ordered to Cease and Desist From Any Present or Future Conduct in Violation of, or in Furtherance of the Violation of, Section 73.658(b), including but not limited to current or future affiliations, arrangements, understandings, or agreements, express or implied, with the NBC television network, which permit, or would permit in the future, the distribution of the network's programming by Sunbelt, its subsidiaries or affiliates, in the community of Great Falls, Montana, or which prevents any other broadcast station licensed to the community of Great Falls from airing the network's programs; and
3. An Order to Show Cause why NBC Universal Should Not Be Ordered to Cease and Desist From All Conduct Present and Future in Furtherance of Sunbelt's Violation of Section 73.658(b).

Respectfully submitted,

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June 24, 2005

CERTIFICATE OF SERVICE

I, Angela C. Spencer, do hereby certify that on this 24th day of June, 2005, a copy of the foregoing "Supplement To Joint Motion For Expedited Issuance Of Show Cause Orders" was served by first class United States mail, postage prepaid, addressed to:

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Angela C. Spencer

EXHIBIT A

DECLARATION OF A. EUGENE LOVING

Under penalty of perjury I, A. Eugene Loving, hereby declare that:

1. I am the Chairman and Chief Executive Officer of Max Media LLC ("Max Media"). I have personal knowledge of the following facts, except where noted.

2. I have read the letter from F. William LeBeau, Senior Regulatory Counsel for NBC Universal, Inc. ("NBC"), to Marlene H. Dortch, Secretary of the Federal Communications Commission, dated June 21, 2005 ("NBC Submission") and the Supplement to Joint Motion for Expedited Issuance of Show Cause Orders dated June 24, 2005, to which this declaration is attached. The NBC Submission creates a false impression regarding KTGF(TV)'s performance as an affiliate to which I hereby respond.

3. I have personal knowledge of the business affairs of Max Media's Montana operations, including KTGF(TV), Great Falls, Montana ("KTGF"), from the time a subsidiary of Max acquired KTGF from Continental Television Network ("Continental") on March 28, 2001, until Max Media sold the station to Destiny Communications, LLC on November 24, 2004.

4. As an initial matter, I observe that this is the first time, in the four years since Max first raised the issue of KTGF's affiliation with NBC, that NBC has provided any specific information regarding problems between NBC and Continental. At no time has NBC or its representatives ever informed me of these long-past events.

5. NBC appears to be claiming that NBC's termination of KTGF's affiliation is the result of an independent business decision, reflected in two letters provided as exhibits to the NBC Submission. Until I was given a copy by my counsel on June 23, 2005, I had never seen these letters. The letter dated March 30, 1993 outlines NBC's regret that Continental decided to cease its local news operations. The letter dated April 27, 1995 serves notice of termination of

the affiliation agreement, alleging that KTGF was providing local commercial spots where network promotional spots should have been aired. The termination was only to take effect if the parties could not work out a "mutually acceptable solution."


6. Obviously, Continental and NBC did find a mutually acceptable solution. Not only was there no termination of the original affiliation agreement (which I understand to have commenced in 1986), NBC subsequently *renewed KTGF's network affiliation for an additional 10 years*. That is to say, *after* the events in 1993 and 1995 that NBC now claims as the basis for its termination of KTGF's current affiliation, Continental and NBC entered into the NBC Network Affiliation Agreement dated April 5, 1996 ("Affiliation Agreement").

7. When NBC consented to the assignment of this Affiliation Agreement from Continental to Max Media of Montana LLC, it did not communicate to me or my representatives any dissatisfaction with KTGF's performance as an affiliate during Continental's ownership of KTGF. That lack of notice, in conjunction with NBC's decision to renew KTGF's original affiliation means that NBC has fabricated nothing more than a hastily cobbled together excuse for Sunbelt Communications Company's misconduct.

8. The circumstances of 1993 and 1995 raised by NBC mean nothing. It is my understanding that Continental did not agree to put local news back on the station to secure renewal of KTGF's affiliation. Further, the hundreds of thousands of dollars that NBC now complains about paying refers to compensation that NBC *agreed to* as part of the subsequent renewal with Continental.

Declaration of A. Eugene Loving
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I declare under penalty of perjury that the foregoing is true and correct. Executed
on June 24, 2005.


A. Eugene Loving